IN THE SUPREME COURT OF FLORIDA

SHANDS TEACHING HOSPITAL AND CLINICS, INC., d/b/a SHANDS HOSPITAL AT THE UNIVERSITY OF FLORIDA; BOARD OF REGENTS, STATE OF FLORIDA, d/b/a UNIVERSITY OF FLORIDA COLLEGE OF MEDICINE,

Petitioners.

v.

JANET LOUISE WARREN, individually and as natural parent and guardian of DANA CARLOTTA WARREN and ISSAC RUSSELL WARREN, minors,

Respondent.
_____/

CASE NO.: 91,718
District Court of Appeal
1st District - No.: 96-2762

ON DISCRETIONARY APPEAL FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL CERTIFIED TO BE IN CONFLICT WITH A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S CORRECTED ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS[1]

Although most of the Defendants' Statement of Case and Facts is correct, there are some statements therein which must be corrected and some important facts which have been omitted.

On May 12, 1994, 85 days after the Complaint had been filed, Warren's counsel, Gary, Williams, Parenti, Finney, Lewis & McManus (hereinafter referred to as "GWP") sent summonses for both Defendants to the clerk for issuance. [R.57; A.1(1); A.2] On May 18, 1994, the clerk's office telephoned GWP and requested that the summonses be prepared for service on a corporate entity. [R.58; A.1(2)] On May 20, 1994, GWP sent to the clerk summonses which were prepared for service on corporate entities. [R.58; A.1(2) A.3] On June 6, 1994, GWP received from the clerk a blank form summons. [R.58; A.1(2)] On June 7, 1994, GWP once again sent to the clerk summonses which were prepared for service on a corporate entity. [R.58; A.1(2); A.4] On June 16, 1994, the sheriff received both summonses and served the same on June 17, 1994, 121 days after the Complaint had been filed. [R.58;A.1(2)]

On April 7, 1994, and again on June 2, 1994, GWP sent letters to Warren inquiring as to whether she wanted to accept the Defendants' offer of settlement. [R.57;A.1(1)] On May 25, 1994, GWP moved to withdraw from the case [R.14-15] and on

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[1]Designation to the Record will be by “R.," to the Transcript of the hearing on January 24, 1995, by “T.1," to the Transcript of the hearing on April 5, 1995, by “T.2," to the Transcript of the hearing on April 15, 1996, by “T.3," to the Transcript of the hearing on June 26, 1996, by “T.4,” to Warren's Appendix by “A.” and to the Defendants’ Brief as “Br.” The Plaintiff, Janet Louise Warren, will be referred to as "Warren." The Defendants/Petitioners will be referred to as “Defendants.”

July 13, 1994, the trial court granted that motion. [R.23-24] On July 6, 1994, the Defendants moved to dismiss the Complaint with prejudice on the grounds that the Complaint had been prematurely filed during the ninety-day presuit period and had been served one day beyond the 120-day period for service allowed by Florida Rule of Civil Procedure 1.070(j). [R.20-22] The motion initially was sent only to Warren herself [R.22], but subsequently GWP requested and received a copy of the motion. GWP then advised the Defendants of authority which indicated that dismissal with prejudice was not proper under these circumstances. [R.260] The Defendants noticed the motion for November 15, 1994, but sent a copy of the notice only to Warren; they did not notice GWP. [A.5]

On November 11, 1994, Warren requested attorney Alan McMichael to represent her at the hearing on the motion.[2] At that time Mr. McMichael advised her that due to the press of other matters, he could not do so. [R.65;A.6(1)] Accordingly, Warren appeared pro se at the hearing. [R.48] The trial court did not dismiss the Complaint but granted Warren ten days in which to file an Amended Complaint. [R. 28-29]

On November 15, 1994, Warren once again requested that Mr. McMichael represent her in this matter. [R.65; A.6(2)] Mr. McMichael advised her that he would attempt to negotiate a

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[2]Since Maria Sperando and GWP had not known about the November 15 hearing or the court's order granting leave to amend, Ms. Sperando did not, contrary to the Defendants' allegation in their Brief at 6, "personally appeal[] to ... Mr. Alan McMichael, to take over the case." Warren herself asked Mr. McMichael to represent her [R.65; A.6 (1)(2)]

settlement on her behalf. [R.65; A.6(1)] To that end, Mr. McMichael telephoned counsel for the Defendants, Robert Zimmerman, to inquire as to whether the Defendants would be willing to renew their settlement offer or reopen settlement negotiations. [R.65-66; A.6(1-2)] He also filed a Motion for Extension of Time to File Amended Complaint in which he explained that he was assuming representation of Warren only for the purpose of obtaining an extension of time to file an Amended Complaint, during which time he represented he would review the Court file and attempt to make an independent determination of the strength of the underlying medical malpractice claim and the amendment that would be necessary to state a cause of action. [R.30-32; A.6(2)] He did not set the motion for hearing because as he read Rule 1.090 of the Florida Rules of Civil Procedure, it provides for an enlargement of time without any notice or hearing. [R.66; A.6(2)]

On December 2, 1994, Mr. Zimmerman advised Mr. McMichael that the Defendants did not want to reopen settlement negotiations. [R.66; A.6(2)] Accordingly, on December 6, 1994, Mr. McMichael sent to Maria Sperando, Warren's former attorney, a letter advising her that he had tried unsuccessfully to reopen settlement negotiations and that he was withdrawing from representing Warren. [R.66; 70-71; A.1(2); A.6(2)] He enclosed with that letter the Defendants' Motion to Dismiss, the Order Granting the Motion to Dismiss with Leave to File an Amended Complaint and the Motion for Extension of Time. [R.66; A.6(2)]

The Defendants' allegation that Mr. McMichael advised the undersigned in a letter dated December 6, 1994, that "he could

not ‘salvage’ the case due to the untimely service of process” [Br. at 5] is untrue. In his letter to the undersigned, Mr. McMichael stated:

> ...I got involved in this case only to see if it could be salvaged. After a lot of thought, I have come to the conclusion that I cannot do anything to rectify the situation. I do not feel that it would be ethically proper for me to file an amended complaint containing an allegation that reasonable grounds exist for the delay in service of process because frankly I do not know the reasons for the delay. I have advised Ms. Warren that there are things that could be done to salvaged[sic] the case, such as an amendment to the complaint as described, but that I am not the attorney who should be doing these things....

[R.70;(emphasis added).]

After receiving the letter from Mr. McMichael, GWP sent a letter to Warren inquiring as to whether she wanted them to pursue this matter. [R.58; A.1(2)] On December 14, 1994, GWP received a letter from Warren answering in the affirmative.[R.58; A.1(2)] During that same time period, Ms. Sperando contacted both Robert Zimmerman and Russell Bobo, attorneys for the Defendants, in an attempt to obtain a settlement on Warren's behalf. [R.59; A.1(3)] Mr. Zimmerman represented to Ms. Sperando that he would not be able to obtain a response until after the New Year when he was to be back in the office. [R.59; A.1(3)] Nevertheless, Ms. Sperando and others from her office spoke on approximately 15 occasions to the Defendants' counsel from approximately December 12, 1994, through January 9, 1995, in an attempt to determine whether they had received a response to the Plaintiff’s demand from their clients. [R.59; A.1(3)]

On January 6, 1995, the Defendants moved to dismiss with prejudice because of Warren's failure to file an Amended Complaint within ten days of the Order dated November 15, 1994. [R. 35-37] On January 9, 1995, the Defendants advised Warren that they would not settle this case for the amount which Warren was requesting but would agree to settle it for a lesser amount. [R.59; A.7] On that same day, GWP relayed the Defendants' position to Warren and requested that she advise them as to whether she wanted to accept the offer the Defendants had made. [R.59; A.1(3)] In a letter dated January 16, 1995, and received by GWP on January 23, 1995, Warren advised GWP that she did not wish to accept the Defendants' offer of settlement and wished to file an Amended Complaint and prosecute her action. [R.17; A.1(3)]

At the hearing on the Defendants' Second Motion to Dismiss with Prejudice held on January 24, 1995, the Defendants' counsel initially argued as follows:

> ... I haven't asked you to re-argue my motion to dismiss on the grounds that it wasn't served within 120 days, nor that the suit was filed during the pre-suit period because that's been ruled on already. We're not here on that today.
>
> We're here on my second motion to dismiss for the plaintiff's failure to file an amended complaint when you ordered that they, two months, two and a half months ago, file an amended complaint within 10 days.

[T.1(1); A.8(1) (emphasis added).]

In response, the trial court noted that the Defendants' request was harsh. [T.1(3); A.8(3)] The Defendants then contradictorily argued that the trial court's order dismissing

the Complaint without prejudice with leave to amend was erroneous because the Complaint had not been served within the 120-day period. [T.1(3-5); A.8(3-5)] The trial court then stated as follows:

> I'm going to correct my previous error and dismiss the civil action. There you are. No problem. You can re-file the lawsuit.

[T.1(5); A.8(5) (emphasis added).]

Warren's counsel then advised the trial court that the statute of limitations had run [T.1(5); A.8(5)], and then explained to the court all of the facts concerning why service was one day late, including the mishap with the clerk's office and that the Defendants would suffer no prejudice as a result of the Amended Complaint's being filed at that time. [T.1(6-11,14); A.8(6-11,14)][3]

The Defendants then reiterated that they were not re-arguing the original Motion to Dismiss but were arguing only the second Motion to Dismiss with Prejudice for failure to file an Amended Complaint. [T.1(12); A.8(12)] The trial court then dismissed

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[3]The undersigned has not, as the Defendants allege [Br. at 6 at n.2], "alternated" between accepting responsibility and blaming her secretary for the late service. She has consistently given as the reason for the late service the miscommunications between the clerk's office and her secretary, although she has taken the ultimate responsibility for the late service. She has not, as the Defendants allege, blamed the late service on her being unable to reach her client about an outstanding settlement offer. [Br. at 9] That is relevant only as to why she first instructed her secretary to effect service; it is not why service was late. She certainly has not blamed the late service on the fact that "she planned to withdraw from the case anyway" as the Defendants allege. [Br. at 9] See infra at 7.

the action "with prejudice because [the Plaintiff] didn't file her amended complaint within 10 days." [T.1(14); A.8(14)]

Warren's counsel then stated as follows in an attempt to persuade the trial court to change its mind:

> Your Honor, at this point, let me just ask you, because now I'm going to have to appeal. . .the court's ruling, it would be much easier if the court would simply allow me 10 days to amend the complaint and then see if Ms. Warren can get counsel. Please, Your Honor--

The trial court responded as follows:

> Counsel, let me say this to you. I don't know how you practice law in South Florida but we practice law in North Florida, and I have ruled.
>
> I don't like my ruling but I have ruled.

[T.1(15); A.8(15)]

On February 3, 1995, Warren filed a motion for Rehearing/ Clarification in which she set forth the facts as described above and argued that dismissal with prejudice was not warranted because the facts at issue did not satisfy the criteria for dismissal set forth by this Court in Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1994), when an amended complaint has not been filed within the time ordered by the trial court. [R. 46-84] On April 5, 1995, that motion was heard. The trial court refused to consider the Kozel factors [T.2(12); A.9(12)] and Warren thereafter appealed that decision [R.96] The First District Court of Appeal reversed the trial court's decision and "remand[ed] for reconsideration under Kozel...." [R. 106; A.10]

Judge Tomlinson was succeeded by Judge Frederick D. Smith

who on April 15, 1996, heard argument on the Defendants' Second Motion to Dismiss with Prejudice specifically with regard to the Kozel factors. [T.3;A.11] Judge Smith expressed his concern as to whether Judge Tomlinson should have initially dismissed the Complaint without leave to amend or whether he should have required that a new action be filed [T.3 (13-14); A.11 (13-14). Warren then explained that the only issue before the court was whether the trial court had abused its discretion in dismissing with prejudice for failure to amend within ten days because those were the only orders which had been appealed. [T.3(15-16); A.11(15-16)]

The trial court denied the Defendants' Second Motion to Dismiss with Prejudice and ruled that "[t]he disobedience in failing to file an Amended Complaint was not willful, deliberate or contumacious, and that the disobedience was due to the neglect or inexperience of both the litigant, JANET LOUISE WARREN, and her attorney(s)." [R.165; A.12]

Inexplicably, the trial court also ruled on the statute of limitations issue as follows:

> [t]he failure of the Plaintiff and her attorney(s) to file the Amended Complaint as ordered by this Court has prejudiced the Defendants because the statutory limitations period expired prior to the entry of the Order on Appeal. This prejudice was not due to any delay caused by the appeal, but is instead directly related to the failure of the Plaintiff and her attorney(s) to diligently monitor this case and to obey the orders of this Court.

[R.166;A.12] This ruling was perplexing because the First District Court of Appeal had remanded to the trial court only for

Kozel findings [R.106; A.10], and further because Warren had apprised the trial court of the holding in Hospital Corp. of America v. Lindberg, 571 So.2d 446, 449 (Fla. 1990), that when a complaint has been filed prematurely during the 90-day presuit period, it should be dismissed with leave to amend when the notice of intent has been served within the limitations period.

More troubling still was the trial court's finding that "[t]he withdrawal of Attorney Sperando while there was pending a Motion to Dismiss for lack of timely service of process was extremely prejudicial to her client, and led to most of the problems occasioned by everyone else involved in this case." [R.167; (emphasis added).] In fact, the record reflects that GWP's motion to withdraw had been granted before the Defendants had even mailed their Motion to Dismiss. The record reflects that GWP moved to withdraw on May 25, 1994 [R.15], that said motion was heard by telephone on June 28, 1994 [R.16] and orally granted at that time, that the order granting said motion was signed on July 13, 1994 [R.24], that the Defendants mailed their Motion to Dismiss on July 6, 1994 [R.22], that said motion was mailed only to Warren and not to GWP [R.22], that upon finding out about the motion after they had been allowed to withdraw, GWP advised the Defendants of authority which indicated that dismissal was improper [R.260] and that GWP was not notified of the hearing on the Motion to Dismiss. [A.5]

Warren filed her First Amended Complaint on May 28, 1996. [R.169] The Defendants moved to dismiss alleging that Warren had failed to show good cause for the one-day late service of the original Complaint and that the statute of limitations had run.

[R.244-47] They also moved for sanctions, including attorney's fees and costs the Defendants had incurred on the appeal which Warren had won. [R.248-303] Warren responded to the Motion to Dismiss [R.308-420], and argument was heard on June 26, 1996. [T.4;A.13] Contrary to the Defendants' allegation, the trial court nowhere stated that ". . .it would not allow Ms. Sperando to exploit the initial dismissal with leave to amend to escape rule 1.070(j). . . ."[Br. at 16][R.421-22] The trial court stated that it would not allow her "to exploit it further,"[T.4 (18);A.13(18)], the "it" being argument as to the trial court's justification for "in effect overruling Judge Tomlinson's order."[T.4(18);A.13(18)]

Judge Smith questioned whether first seeking a summons from the clerk's office after "something approaching 90 days" had run was excusable, rejected Warren's argument that the rule did not require her to seek a summons within 90 days but rather to serve the complaint within 120 days, noted his recollection "that the court says the attorney doesn't attempt to explain why he waited some 90 days or so to get the summons," and asked why the undersigned "waited that long to get the summons from the clerk of the court." [T.4(13-14);A.13(13-14)]

It was then that the undersigned explained why she had waited 85 days before seeking a summons from the clerk's office:

> ...I wanted to withdraw. I notified [Warren]of that. We had an outstanding offer of settlement. I had suggested that she take it. I had communicated to her, I don't have it in front of me, well before the 90 days.
>
> I had asked her in writing I think twice as to whether she wanted to settle. When it became apparent to me that the 120 days was

> running and I was not getting a response from her at that point I said to my secretary, 'Well, in case she does not want to accept the offer and wants to go forward with this, we need to protect ourselves and serve the complaint.' And that therefore ensued. And I have to say my secretary at the time, who's no longer with us, was not--made a number of mistakes, but I have to take ultimate responsibility because I didn't keep track of, you know, what the clerk's office was doing and whether she was getting it to. . . whoever she had to get it to.

[T.4(14-15);A.13(14-15)]

That, however, was not why service was late. T.4(15);A.13(15)] The undersigned explained that the late service was due to the clerk's office twice sending back to the undersigned's secretary the summonses form she had sent.[T.4(13,15);A.13(13,15)] Had it not been for that mixup, service would have been effected within the 120 days even though the summonses had been requested from the clerk after 85 days had run.

The trial court then granted the Defendants' Third Motion To Dismiss without prejudice, ruling as follows:

> ...I'm concerned that I'm making an error in what I'm about to do, but I think that this has been a mass of confusion. And the only way to straighten it out is to go back and make a decision that's in accordance with the rules and the law and I'll do my best to do that. I think that the long period of time that you waited between the filing of the complaint and even seeking a summons from the clerk has not been justified on your showing of good cause. I don't think you've shown good cause.
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> The justification can't be based on the convenience of the plaintiff it seems to me or the plaintiff's attorney. That's not the

> purpose of the rule. The rule is for other purposes. And aside from the recent case in the Fifth DCA you've cited there are lots of other cases, particularly in the first, where the courts have followed more closely the federal rule. And it's rather strict and rather harsh I'll admit, but I think that's the law that I'm bound to follow in this district. So-
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> * * *
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> I don't like to make decisions that invite an appeal, but I assume that this will....

[T.4(16-18);A.13(16-18)(emphasis added.)]

The Order was entered on July 1, 1996.[R.421;A.14] Warren filed her Notice of Appeal on July 17, 1996.[R.425]

The Defendants allege that "[t]he First District Court of Appeal appears to have viewed with considerable skepticism, [Warren's] contention that a 'snafu' between a secretary and a court clerk is good cause for the late service of a lawsuit"[Br.at 9 n. 4,23], but point to no place in the decision where such skepticism was expressed. In fact, that court expressed no position concerning the good cause issue but merely explained Warren's position on that issue and then stated:

> The trial court did not consider the Kozel factors in ruling on the good cause issue. Our review of recent case law indicates such consideration is appropriate in the present circumstances....

[A.15(6)]

SUMMARY OF ARGUMENT

Warren asks that this Court approve the decision below and hold that a trial court must consider the six factors set forth in Kozel v. Ostendorf, supra, 629 So.2d 817, when determining the good cause required by Fla. R. Civ. P. 1.070(j). This Court has the power to require that the Kozel factors be considered when the good cause determination required by Rule 1.070(j) is made. As the author of the rules of civil procedure, this Court has the concomitant responsibility to interpret and enforce them so as to insure that justice will be effected as long as its interpretation is consistent with the language of the rules.

Contrary to the Defendants' contention, the "plain language" of Rule 1.070(j) does not address whether the Kozel factors should be applied to the good cause determination and nothing about the rule, either its requirements or its purpose, prohibits the consideration of the Kozel factors. In fact, application of the Kozel factors to the determination of the good cause required by Rule 1.070(j) would ameliorate the widely acknowledged and severely criticized harsh effects caused by the mechanical application of the rule. It would protect the right of litigants to have their day in court while at the same time protect the purpose of the rule which is the efficient administration of justice. Application of the Kozel factors would bring uniformity and fairness to a process that is now arbitrary and unfair. The

Kozel factors are a meaningful set of guidelines which better insure that all litigants whose attorneys fail to obey procedural rules will suffer the same or similar consequences. Indeed, even the Defendants acknowledge that "[o]ne could argue that application of something like the Kozel factors is worthwhile in any case involving dismissal of a Complaint, especially where a statute of limitations problem bars further filings." [Br. at 12]

Nothing this Court said in Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992), is inconsistent with the application of the Kozel factors to the determination of good cause required by Rule 1.070(j). This Court did not address whether the Kozel factors should be applied to the determination of good cause. But even if the First District's holding below applying the Kozel factors to the determination of good cause is inconsistent with Morales, this Court nevertheless has the power to and should embrace that holding as its own, thereby allowing the purpose of Rule 1.070(j) to be served while at the same time insuring that litigants will not be punished for the mistakes of their attorneys and that cases will be heard on the merits.

ARGUMENT

I. CONSIDERATION OF THE KOZEL FACTORS IS APPROPRIATE WHEN DETERMINING WHETHER GOOD CAUSE PURSUANT TO RULE 1.070(J) HAS BEEN SHOWN BECAUSE THAT WOULD ALLOW THE PURPOSE OF THE RULE TO BE SERVED AND ALSO PROTECT THE RIGHTS OF LITIGANTS TO HAVE THEIR DAY IN COURT.

"[Rule 1.070(j)] should be able to fulfill its purpose as a case management tool without the harsh effects caused by a mechanical application of the rule." Patterson v. Loewenstein, 686 So.2d 776, 778 (Fla. 4th DCA 1997)(Pariente, J., specially concurring). Application of the Kozel factors to the determination of good cause would accomplish that objective. This Court, as the author of Rule 1.070(j), has the power to require that it be interpreted in conjunction with the Kozel factors and to thereby ameliorate its harsh effects.

Thus the Defendants' central premise, i.e., that the application of the Kozel factors to the good cause showing required by Rule 1.070(j)is contrary to this Court's holding in Morales v. Sperry Rand Corp., supra, 601 So.2d 538 [Br. 13,15],[4] is not only incorrect but is irrelevant to the issue before this Court. The issue is not whether the First District Court of Appeal's application of the Kozel factors to the determination of good cause is consistent with this Court's precedent; the issue is whether the First District was correct, i.e., whether the Kozel factors should be applied to the determination of good cause. Nine judges of the First District

[4]The Defendants state that "[u]ltimately. . .this case comes down to whether this Court will sanction the rewriting of the rules by district courts of appeal in the face of clear contrary law from this Court on the same point." [Br. at 13]

Court of Appeal have held that it should be.[5] This Court should embrace that holding as its own, thereby allowing the purpose of Rule 1.070(j) to be served while at the same time insuring that litigants will not be punished for the mistakes of their attorneys and that cases will be heard on the merits.

This Court has the exclusive authority to adopt "rules for the practice and procedure in all courts. . . ." Art. V, Section 2, Fla. Const.; see Haven Federal Savings & Loan Ass'n v. Kirian, 579 So.2d 730, 732 (Fla. 1991); Benyard v. Wainwright, 322 So.2d 473,475 (Fla. 1975); Petition of Stoll, 309 So.2d 190, 191 (Fla. 1st DCA 1975)("service of process is a procedural step in the prosecution of litigation and is within the ambit of the rulemaking power vested in the Supreme Court of Florida"). This Court also has the concomitant responsibility to interpret and enforce the rules of procedure so as to insure that justice will be effected as long as its interpretation is consistent with the language of the rules. See State v. Page, 449 So.2d 813,815 (Fla. 1984); Ser-Nestler, Inc. v. General Finance Loan Co. Of Miami Northwest, 167 So.2d 230, 232 (Fla.3d DCA 1964), appeal dismissed, 174 So.2d 35 (Fla. 1965)(Florida Supreme Court is vested with sole authority to promulgate, rescind and modify rules).

In fact, even if the application of the Kozel factors to the

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[5]The three judges who so held in Crews v. Shadburne, 637 So.2d 979,979,981 (Fla.1st DCA 1994), were Zehmer, Smith and Lawrence. The three judges who so held in Gaines v. Placilla, 634 So.2d 711,712 (Fla.1st DCA 1994), were Jorgenson, Barfield and Benton. The three judges who so held below are Booth, Joanos and Wolf.

determination of good cause is at odds with this Court's own precedents, this Court has the power to adopt the First District's holding below anyway and require that the Kozel factors be applied to the determination of good cause. See State v. Lyons, 293 So.2d 391,393 (Fla. 2d DCA 1974) (Supreme Court has right to adopt rule at variance from its own precedents).[6]

This Court is charged with the responsibility of rulemaking and has the concomitant power and duty to ameliorate the harsh effects of its rules when to fail to do so would result in manifest injustice. It is the function of this Court to effect justice within the parameters of the power accorded it by the Constitution of the State of Florida and within the boundaries imposed by the Constitution of the United States.

At issue here is not the interpretation of a statute passed by the legislature which this Court is bound to interpret strictly and in conformity with legislative intent. At issue is the interpretation and enforcement of a rule promulgated by this Court for which this Court, not the legislature, is ultimately responsible. See Bobb v. State, 647 So.2d 881,883 (Fla. 4th DCA 1994), rev. denied, 659 So.2d 270 (1995) (analysis of provision in code of evidence, adopted by Supreme Court as court rule, was not governed by legislative intent and principles of statutory interpretation did not apply).

This Court has long recognized that "[p]rocedural rules should be given a construction calculated to further justice, not

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[6]Warren, however, does not agree that the application of the Kozel factors to the determination of good cause is inconsistent with Morales. See infra at 24.

to frustrate it." Singletary v. State, 322 So.2d 551,555 (Fla. 1975). Accord, Holland v. Miami Springs Bank, 53 So.2d 646,647 (Fla. 1951); Shores v. Murphy, 88 So.2d 294 (Fla. 1956). The courts of this State have long recognized that the "rules of civil procedure were not designed to be used in a manner to cause oppression or harassment to the parties of a lawsuit, but should be liberally construed to effectuate the intended purposes of allowing a complainant to state his cause and facilitate an expeditious trial on the merits." Canella v. Bryant, 235 So.2d 328,332 (Fla.4th DCA 1970).

"When a strict enforcement of the letter of practice rules tends to prevent or jeopardize administration of justice, the rules should yield to a higher purpose."Id. Accord, Pruitt v. Brock, 437 So.2d 768,774 (Fla. 1st DCA 1983);Howard v. McAuley, 436 So.2d 392,394 (Fla. 2d DCA 1983); Young v. Metropolitan Dade County, 201 So.2d 594, 596 (Fla.3d DCA), cert. denied, 207 So.2d 690 (Fla. 1967). "All rules of procedure must be used as tools for obtaining the just as well as the speedy determination of causes." Glassman v. Deauville Enterprises, Inc., 99 So.2d 641,642 (Fla.3d DCA 1958).

"Applying the rule to the facts of this case has the potential for improperly turning Rule 1.070(j) into 'an instrument of oppression' when the rule, patterned after Rule 4(j) of the Federal Rules of Civil Procedure, was intended to be 'a useful tool for docket management.'" O'Leary v. MacDonald, 657 So. 2d. 81, 82 (Fla. 4th DCA 1995) (Pariente, J., specially concurring), citing United States v. Ayer, 857 F.2d 881, 886 (1st Cir. 1988). Accordingly, this Court should take this opportunity

to stop the unfair application of Rule 1.070(j) which results in actions being dismissed on the merits even though no prejudice to the defendant has occurred and instruct the lower courts to apply the Kozel factors to the determination of good cause. This Court should not allow form to override substance or procedural technicalities to defeat fairness and justice. See McGee v. State, 438 So.2d 127,133 (Fla. 1st DCA 1983).

As the Defendants acknowledge [Br. at 1-2,20], Rule 1.070(j) has long been criticized by the district courts. The First District is not alone in its displeasure with the rule. Judge Schwartz, in his concurring opinion in Hernandez v. Page, 580 So.2d 793,795 (Fla. 3d DCA 1991), was the first to express his concern with the rule. In his concurring opinion, Judge Schwartz stated as follows:

> ...Rule 1.070(j) is another, quite ill-considered, but--as this case illustrates--quite successful attempt to elevate the demands of speed and efficiency in the administration of justice over the substantive rights of the parties which the system is in business only to serve. Summit Chase Condominium Assoc. v. Protean Investors, Inc., 421 So.2d 562 (Fla. 3d DCA 1982) (Schwartz, J., concurring in part, dissenting in part). In this instance, the rule has caused the dismissal of an action because the defendants were not served with process, even though those same parties had been served, were fully aware of the action, had retained counsel and had defended themselves in an earlier incarnation of the same case. Indeed, they continued to be represented after that first action had been terminated by a voluntary dismissal on the eve of trial. Thus, the defendants have succeeded in escaping liability only because the plaintiffs' lawyers fell into a procedural pit unrelated to the merits of the

> case or the substantive interests of the defendants. The result is to transfer the burden of the defendants' liability to the plaintiffs' attorney or his malpractice carrier. I do not believe that such a result properly serves the administration of justice as the rules are supposedly intended to do.

580 So.2d at 795-96; (emphasis in original).

Justice Pariente of this Court, when on the Fourth District Court of Appeal, expressed her agreement with Judge Schwartz's concerns. In fact, Justice Pariente has repeatedly urged revision of Rule 1.070(j) to ameliorate its harsh effects. In Taco Bell Corp. v. Costanza, 686 So.2d 773, 773-74 (Fla. 4th DCA 1997) (Pariente, J., specially concurring), she supported the change in the federal 120-day rule which allows a court to direct that service be effected within a specified time even when the plaintiff has not shown good cause. Id. She explained that "[b]y allowing a trial court broad discretion to grant an extension to serve the summons when good cause has not been demonstrated, [the federal rule] now truly fulfills its function as a case management tool, without the harsh effects of the old rule." Id. See also Porolniczak v. Itkin, 703 So.2d 519, 520 (Fla. 4th DCA 1997)(Pariente, J., specially concurring); Patterson v. Loewenstein, supra, 686 So.2d at 776, 777-78 (Pariente, J., specially concurring); O'Leary v. MacDonald,supra, 657 So.2d at 81-82 (Fla. 4th DCA 1995)(Pariente, J, specially concurring).

The Second District Court of Appeal in Greco v. Pedersen, 583 So.2d 783, 785 (Fla. 2d DCA 1991), also agreed with Judge Schwartz's concerns. Speaking for the court, Judge Altenbernd stated that "[w]e are dismissing this case, while perhaps

upholding the predicate for a new lawsuit against yet another attorney, in the supposed interest of efficient judicial administration." Id. The court then proposed that the rule's purposes would be better served "if the trial court were authorized to issue an order to show cause after 90 days from the filing of the complaint, granting the plaintiff an additional 30 days in which to serve process or show cause why service could not be achieved." Id. According to the court, "[t]his would promote efficient judicial administration without unduly compromising the substantive rights of the parties which the system is in business only to serve." Id. See also Maher v. Best Western Inn, 667 So.2d 1024, 1026, 1027 (Fla. 5th DCA 1996)(Griffin, J., dissenting) (noting that the rule has been "widely and properly criticized" and urging "that Florida adopt an amendment similar to or better than the federal amendment").

The Defendants acknowledge that "the result of proper enforcement of the rule in this case is harsh." [Br. at 15].[7] They acknowledge that "a number of district court judges have asked this Court to reconsider the rule's harsh effects in cases, like this one, where the statute of limitations has run out [sic] between the time of filing the complaint and the time of late service." [Br. at 1-2,20]. They agree that "[p]erhaps the rule should be revised just as the federal rule has been changed and

[7]Warren disagrees that the proper enforcement of the rule in this case would be harsh because she did demonstrate good cause for the late service and the trial court should have so held. See infra at 42-50. However, there have been numerous cases in which the proper enforcement of the rule was in fact harsh. See e.g., Greco v. Pederson, supra, 583 So.2d 783.

as some district court judges have suggested so as to avoid statute of limitations problems." [Br. at 12,13,21]. They concede that "[o]ne could argue that application of something like the Kozel factors is worthwhile in any case involving dismissal of a Complaint, especially where a statute of limitations problem bars further filings." [Br. at 12].

Notwithstanding all of these concessions and admissions, the only reasons that the Defendants offer in support of their contention that the Kozel factors should not be applied to the determination of good cause is that such application would be inconsistent with this Court's precedent in Morales [Br. at 13,15], that "the current rule simply does not allow it" [Br. at 12], and that "the Kozel factors simply do not lend themselves to the inquiry of good cause for late service of process." [Br. at 12-13]. With regard to each reason, they are wrong.

A. Application of the Kozel factors is not inconsistent with Morales.

The First District's application of the Kozel factors to the determination of good cause is not inconsistent with this Court's decision in Morales v. Sperry Rand Corp., supra. The three-judge panel of the First District Court of Appeal which unanimously rendered the decision below no doubt was aware of this Court's ruling in Morales and that it is bound by that decision.[8] Nowhere in the district court's opinion is there any indication that the court believed that it was making new law, rewriting Rule

[8]Indeed, the Defendants cited Morales twice in each of their briefs to that court on the two appeals taken in this case.

1.070(j) ”without authority or justification” [Br. at 12] because it does not like it, ignoring this Court's precedent or abandoning the good cause test for late service and the abuse of discretion standard as the Defendants claim. [Br. at 2,3,12,15, 23] In fact, the evidence indicates that the district court believed its decision comported with the precedence and philosophy of this Court. See infra at 29-30. The Defendants' accusing the district court of “inappropriately ignor[ing] the plain and unequivocal language of [Rule 1.070(j)], unjustifiably and illegitimately [taking] upon itself the power to change the rule, and recklessly abandon[ing] the appellate standard of review for such cases as created by decisions of this Court” [Br. at 3] merely "to relieve [Maria Sperando] of the burden placed upon her by the rules" [Br. at 3,15] must come as quite a surprise to Judges Booth, Joanos and Wolf.

In Morales, this Court held that Rule 1.070(j) requires dismissal when a plaintiff shows no good cause for the failure to obtain service of process within 120 days of the filing of the complaint even when service of process is effected before a motion to dismiss predicated on noncompliance with Rule 1.070(j) is filed. 601 So.2d at 538. Nowhere did this Court address whether the Kozel factors should be applied to the determination of good cause. This Court has never ruled on this question.

The Defendants are correct that this Court in Morales noted that an approach to Rule 1.070(j) that appeared reasonable would nevertheless be rejected if it “negate[d] rule 1.070(j) and the reason for its existence.” Morales, supra, 601 So.2d at 540. [Br. at 16] However, the application of the Kozel factors to the

determination of good cause would neither negate Rule 1.070(j) nor the reason for its existence, unlike allowing service of process to be effected after 120 days of the filing of the complaint but before a motion to dismiss is filed which was the issue in Morales. See infra at 37-41.

Thus the choice the Defendants offer this Court, that of between "standing firm on its prior decision in Morales and the plain language of the rule, or allow [sic] the district court to rewrite the rule, ignoring this Court's precedent on the matter" [Br. at 15], is a false one.[9]

Moreover, in holding that the trial court should consider the Kozel factors when determining whether good cause has been shown, the district court did not, contrary to the Defendants' contention "abandon[] the abuse of discretion standard unequivocally established by Morales...." [Br. at 15] Once the

[9]The Defendants correctly note that "if plaintiff's counsel can't meet the deadline, she can ask for more time under the rules of procedure" based on this Court's statement in Morales that Rule 1.070(j) is not "'unduly harsh in that the trial judge has broad discretion under Florida Rule of Civil Procedure 1.090(b) to extend the time limitation if reasonable grounds are asserted before the 120 day period expires'. . . ." [Br. at 14] However, this assumes that the plaintiff's attorney is aware during the 120-day period that her attempt at service was unsuccessful within those 120 days. That service in this case was on the 121st day came as a complete surprise to the undersigned who was made aware of the late service when she found out about the motion to dismiss. Nowhere do the Defendants allege any evidence that the undersigned was aware during the 120 days that service during that time could not or would not be accomplished. Upon being made aware of the late service and motion to dismiss, the undersigned sent to the Defendants' counsel authority explaining why dismissal wasn't justified. [R.260] The undersigned was unaware of any further action on the matter until she was contacted by Alan McMichael. [A.5]

trial court determines whether good cause has been demonstrated by considering the Kozel factors, the appellate court then must review that decision under an abuse of discretion standard. By requiring the consideration of the Kozel factors when good cause is determined, the district court merely imposed guidelines already established by this Court for determining when dismissal is appropriate when a rule has been violated. In so doing, the district court brought more structure, uniformity and fairness to a process that otherwise can be arbitrary and unfair with no countervailing benefit.

That the First District Court of Appeal is aware of and adheres to the abuse of discretion standard of review is proven by Carlton v. Wal-Mart Stores, Inc., 621 So.2d 451,454 (Fla. 1st DCA 1993), wherein the First District, citing Morales, held that "the propriety of the trial court's dismissal must be assessed according to the abuse of discretion standard."[10] In that case as well, the First District noted that this Court in Morales at least tacitly recognized the relevance of federal decisions interpreting Rule 4(j) to the interpretation of Rule 1.070(j). Id. The court then stated as follows:

> [W]e note the cogent admonition of the leading commentators on the Federal Rules:
>
> > 'In determining what is and what is not good cause, the courts will be forced to balance the clear intent of Rule 4(j) and the desire to provide litigants their day in court. A timely service of process and a just adjudication on the

[10]Judge Booth participated in Carlton and the decision below:

> merits of an action are not inconsistent, but over-emphasis on either could lead to undesired consequences. If good cause is measured too restrictively, then too many good faith plaintiffs may be treated harshly. If good cause extensions are given too freely, then the risk is the emasculation of Rule 4(j). It will take some years of case law development to determine the meaning of "good cause," and it can only be hoped that a desirable equilibrium balancing the need for speedy process and the ideal of just adjudication will be struck by the courts.'
>
> 4A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Section 1137 at 391-92(1987).

Id.;(emphasis added).

The First District below relied for its holding on its decisions in Crews v. Shadburne, supra, 637 So.2d 979, and Gaines v. Placilla, supra, 634 So.2d 711.[11] In Crews, the plaintiffs obtained a summons the same day they filed their complaint. After it was returned about three weeks later as being unservable, the plaintiffs effected substituted service of process at the same address at which initial service had been

[11] Unlike the First District, the Fourth District Court of Appeal in Stahl v. Evans, 691 So.2d 1184,1185 (Fla. 4th DCA 1997), relied on no authority for and gave no explanation in support of its holding that the Kozel factors don't apply to the determination of the good cause required by Rule 1.070(j) other than to say that "Kozel...is not controlling since it does not pertain to a Rule 1.070(j) dismissal." The statement is circuitous and conclusory; the court offers no explanation or reason as to why Kozel does not pertain to a Rule 1.070(j) dismissal.

unsuccessfully attempted. This notice was returned marked undelivered. Thereafter the plaintiffs moved for default several days after the 120-day period had run. The defendant then obtained notice of the suit and moved to dismiss based in part on the contention that she had not been served within 120 days of when the complaint had been filed. Id. at 979-80.

The Court reversed the order dismissing the complaint for failure to comply with Rule 1.070(j) and explained as follows:

> ...in the instant case the summons issued contemporaneously with the initial filing of the complaint and, after the summons was returned unservable, the [plaintiffs] made persistent efforts to utilize, albeit not strictly in compliance with the statute, constructive service of process without delay. We decline to view the technical deficiencies in counsel's good faith efforts to achieve proper service of process as equating with the dilatory behavior underlying the decisions in Morales, Hernandez, and Gondal. See also Austin v. Gaylord, 603 So.2d 66 (Fla. 1st DCA 1992)(reversing an order denying motion to dismiss under rule 1.070(g), where the plaintiff failed entirely to serve the Department of Insurance within 120 days after the filing of the amended complaint and offered no evidence to show the exercise of due diligence or good cause for not having done so)....

Id. at 980-81.

The court then turned to Kozel v. Ostendorf, supra, 629 So.2d at 818, in which this Court stated that a trial court's decision "to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote." The First District noted as follows:

> ...Although Kozel did not involve rule 1.070(j), the supreme court's comments comport with those expressed by this court in Carlton v. Wal-Mart Stores, Inc., 621 So.2d 451 (Fla. 1st DCA 1993), wherein we carefully balanced the purpose to be served by rule 1.070(j) and the rights of the litigants to have their day in court. In balancing those same interests in the instant case, we conclude that the trial court abused its discretion in dismissing this case. Here, the [plaintiffs] consistently demonstrated due diligence in attempting to serve the initial complaint, in attempting to obtain constructive service thereafter, and in ultimately obtaining proper service of process once the defect in the pleading was brought to their attention. In short, they did not sleep on their rights and obligations. The trial court's order dismissing this case exacted too harsh a sanction under the circumstances, especially since the only defect in the proceedings was a technical omission in the allegations of the complaint....

Id. at 981; (emphasis added).

Similarly in this case, "[t]he trial court's order dismissing this case exacted too harsh a sanction under the circumstances...." Id. Although the Defendants allege that "[t]he circumstances in Crews are a far cry from the situation here" [Br. at 22], they miss the point of Crews and indeed the point of this Court in Kozel, i.e., the purpose to be served by the rules of procedure should be carefully balanced with the rights of litigants to have their day in court and litigants should not suffer the ultimate punishment of dismissal solely because of their attorney's neglect. Thus, while the facts of Crews may be different from the facts at issue in this case, the facts at issue here nevertheless do not justify Warren's

suffering the ultimate punishment of dismissal. See infra at 42.

. In the other case relied on by the First District below, Gaines v. Placilla, supra, 634 So.2d at 712, a medical malpractice action was dismissed with prejudice because of late service. The First District reversed because the dismissal was with prejudice and directed the trial court on remand to consider the Kozel factors. Id. The court explained that its "conclusion that the Kozel factors should be applied rests upon our firm conviction that to do otherwise in this case would result in manifest injustice." Id. Unfortunately, the court did not explain the facts at issue in that case. However, the court did cite to Judge Schwartz's concurring opinion in Hernandez v. Page, supra, 580 So.2d at 795.

B. There is nothing about the purpose or requirements of Rule 1.070(j) which would prohibit the application of the Kozel factors to the determination of good cause.

The Defendants repeatedly mention the “clear and unequivocal requirements of” Rule 1.070(j) [Br. at 12,16], requirements which they allege prohibit the application of the Kozel factors to the determination of good cause. They acknowledge that “the First District Court of Appeal’s wish to avoid extinguishing Warren’s cause of action may be laudable,” but cannot be effected because of these “clear and unequivocal requirements” of the rule. [Br. at 12] The problem with the Defendants’ argument is that they never delineate what these “clear and unequivocal requirements” of the rule are other than to say that a showing of good cause is required.

Warren agrees with the Defendants that Rule 1.070(j) is “clear and unequivocal [that] [s]ervice beyond 120 days--even one

day beyond--requires dismissal unless the plaintiff shows good cause for the late service." [Br. at 16; (emphasis in original)]. That, however, begs the question; it does not address how the determination of good cause should be made.

Contrary to the Defendants' contention [Br. at 16], application of the Kozel factors to the determination of good cause under Rule 1.070(j) does not render the rule ineffective and is not contrary to its purpose. Rather than rendering Rule 1.070(j) ineffective, the application of the Kozel factors to the determination of good cause establishes a meaningful set of guidelines to assist the trial courts in determining good cause and it better insures that a complaint will be dismissed only when the good cause exception has not been met and only when the purpose of the rule, i.e., to efficiently move cases through the court system, will be served by the dismissal. In fact, one of the Kozel factors which must be considered is whether the delay created significant problems of judicial administration, the prevention of which is, of course, the purpose of the rule.

The Defendants note and do not contest Warren's argument that one-day late service does not thwart the purpose of Rule 1.070(j). The best response they can offer is that this "emotionally appealing" argument "cannot be entertained at the clear expense of the requirements of the Rule" [Br. at 12], once again getting back to what the rule requires, which is only a showing of good cause, the determination of which can and should be made by considering the Kozel factors.

The Defendants attempt to elevate form over substance by distinguishing between "[g]ood cause as a sanction and good cause

for dismissal pursuant to a long established rule of civil procedure," [Br. at 12], which, they allege, "are two entirely different matters." [Br. at 12] They argue that "the good cause determination is made relative to reasons that service was not timely made [whereas] the Kozel factors invoke issues of whether the dismissal itself would be a harsh or unbalanced result of the late service" [Br. at 11-12; (emphasis in original)] as if that somehow should prevent the application of the Kozel factors to the determination of good cause pursuant to Rule 1.070(j).

That dismissal of a complaint as a sanction is not procedurally the same as dismissal for failure to follow Rule 1.070(j) does not mean that the good cause determination that must be made in each case should not be made by considering the same guidelines. There is nothing to prevent this Court from requiring the trial courts to consider the same (Kozel) guidelines when determining good cause for the dismissal of a complaint as when determining good cause for late service and the Defendants offer none other than to say that they are procedurally different. However, their effect is the same, i.e., dismissal, and the objective that cases should be heard on the merits whenever possible is the same, or should be the same, in both cases.

That the Kozel factors are guidelines to be considered when determining an appropriate sanction for acts of malfeasance or disobedience whereas "Rule 1.070(j) is a rule enforced on all plaintiffs for the purpose of ensuring diligent prosecution of lawsuits" [Br. at 16-17], is no reason not to apply the Kozel factors to the determination of the good cause finding required

by Rule 1.070(j). Although "the rule asks the trial court to consider whether the plaintiff had good cause for failing to meet the terms of the rule of procedure, not whether there is good cause to dismiss the lawsuit as a sanction" [Br. at 17], the failure to establish the good cause required in both instances will result in dismissal.

Thus the Defendants' contention that Rule 1.070(j) is not a rule about sanctions [Br. at 16], is both disingenuous and irrelevant. Of course it's a rule about sanctions; the sanction is dismissal for failure to follow the requirement of the rule that service be made within 120 days of filing the complaint. Even the Defendants admit that "the effect of dismissal of a complaint as a sanction may have the same effect as dismissal for failure to follow the rules of civil procedure. . . ."[Br. at 17;(emphasis in original).] More to the point, the sanction is against the litigant, not the attorney. As in Kozel, the trial court's "decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant. . ." Kozel, 629 So.2d at 818. The 120-day rule governs the actions of attorneys, not litigants. However, "dismissal with prejudice would in effect punish the litigant instead of his counsel," Beasley v. Girten, 61 So.2d 179, 181 (Fla. 1952), a result disapproved by this Court in Kozel.

Borrowing from a concept with which this Court is intimately familiar, i.e., proportionality of punishment in capital murder cases, Warren asks this Court to consider why the punishment for violating Rule 1.070(j) should be any different from the punishment for violation of any other rule, e.g., failure to

amend within the time mandated by a trial court. "To attain true justice, the written law must be seasoned with a proper amount of common sense." State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904,910 (Fla. 1976). However, it makes no sense for a litigant whose attorney fails to serve a complaint within the 120-day period to suffer the ultimate punishment of dismissal whereas the litigant whose attorney fails to amend a complaint in a timely fashion will either suffer no punishment or suffer a punishment much less drastic than that of dismissal. Application of the Kozel factors to the determination of the good cause required by Rule 1.070(j) will better insure that litigants whose attorneys fail to obey Rule 1.070(j) will suffer the same or similar consequences as litigants whose attorneys fail to obey other procedural rules while at the same time insuring that the purpose of Rule 1.070(j) will be protected.

That the rationale of Kozel should be applied to the good cause determination required by Rule 1.070(j) is supported by Dixon v. Riviera Beach, 662 So.2d 424, 425 (Fla. 4th DCA 1995), rev. denied, 675 So.2d 119 (Fla. 1996). The Defendants note that district courts other than the First District Court of Appeal have "enforced [Rule 1.070(j)] appropriately and called for reform of the rule" [Br. at 21], but they have failed to advise this Court of Dixon, in which the Fourth District applied the rationale of Kozel to the interpretation and enforcement of another rule of civil procedure, i.e., Fla.R.Civ.P. 1.420(e).

In Dixon, the court reversed a dismissal for failure to prosecute, explaining that "because it was the lawyers, not the plaintiffs, who contributed to the errors [resulting in the

failure to prosecute], we believe it inappropriate to punish the plaintiffs." Id. The Fourth District applied the rationale of Kozel, i.e., a litigant should not have to pay the price of dismissal for his lawyer's mistakes, notwithstanding the fact that Rule 1.420(e) makes no reference to considering whether the failure to prosecute was the fault of the attorney or the litigant.[12] As Judge Griffin noted in his dissenting opinion in Maher v. Best Western Inn, supra, 667 So.2d at 1028 n.4, "[w]ithout citing to Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993), [the Dixon court] seems to utilize the reasoning of Kozel to protect a party from the lawyer's failure to meet deadlines."

The Defendants incorrectly and directly cite Pearlstein v. King, 610 So.2d 445 (Fla. 1992), with no specific page reference and no modifying signal, in support of their statements that "[t]his Court has recognized that a court's sympathy for the plight of a litigant who has been adversely affected by proper application of a rule of civil procedure does not, in any fashion, justify winking at the rule" and "[t]he rule simply must be enforced as written." [Brief at 24] This Court nowhere made such statements in Pearlstein. In fact, the language of the rule at issue in Pearlstein, Rule 1.070(j), did not address the issue in that case, i.e., whether the 120-day time limit for serving a

[12]Rule 1.420(e) provides that "[a]ll actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 1 year shall be dismissed by the court on its own motion or on the motion of any interested person. . .unless a stipulation staying the action is approved by the court or a stay order has been filed or a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending."

complaint applies to complaints filed before January 1, 1989, the effective date of the rule. Indeed, Justice Kogan in his dissent, in which Justices Barkett and Shaw concurred, noted that "[a]nyone relying on the rule as drafted would have no notice of [the majority's holding that the rule applies to cases arising before the rule took effect]." 610 So.2d at 446 (Kogan, J., dissenting; (emphasis added). Thus, this Court in Pearlstein did not "simply enforce the rule as written," but enforced it as it thought the rule should be interpreted.

C. The Kozel factors will serve as helpful guidelines to the trial courts when they determine good cause and will bring more uniformity and fairness to the process.

Contrary to the Defendants' contention that three of the six Kozel factors are inapplicable to Rule 1.070(j)[Br. at 18,19,24], all of the six Kozel factors are relevant as to whether there is good cause for late service. Factor one requires the court to consider "whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience." Kozel at 818. Whether the failure to serve the complaint within the 120 days is due to neglect or inexperience or the willful, deliberate or contumacious disobedience of an attorney is relevant to the determination of good cause for the late service just as it is relevant to the determination of good cause for the failure to obey a court order. Surely whether an attorney deliberately and knowingly failed to serve a complaint within the 120 days as opposed to merely having inadvertently failed to do it ought to be taken into account when determining whether good cause has been established for the late service.

Factor two, whether the attorney has previously been

sanctioned, is as relevant to the determination of good cause regarding the failure to effect timely service as it is to the determination of dismissal as a sanction for the failure to timely amend a complaint or obey any other court order. Indeed, the same questions the Defendants ask concerning factor two as applied to the failure to effect timely service, i.e., whether dismissal is required only when an attorney has habitually missed the service deadline or has missed 120-day deadlines in the past [Br. at 19], can be asked when the issue is failure to timely amend a complaint or failure to obey any other court order. For example, should the trial court dismiss a complaint for failure to amend only when the attorney has habitually failed to timely amend a complaint or has failed to timely amend in the past? Of course not. It is but one factor to consider among the six required by the Court. The attorney who routinely or even frequently in the past has failed to obey procedural rules and/or court orders deserves to be treated differently from the attorney for whom this is his first "offense."

To Defendants' question as to how there could be any prior sanction history of an attorney to draw upon in determining good cause for late service if service of a complaint initiates a case [Br. at 24], Warren responds that prior sanction history of the attorney need not be limited to the case at issue but could include the entire sanction history of the attorney. If an attorney has a history of violating court orders or making mistakes adverse to a client's interests which actions have resulted in sanctions, such a history would be relevant as to whether there is good cause for the late service.

Factor four requires the trial court to consider "whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion." Id. Whether the delay prejudiced the opposing party is relevant to efficiently moving cases through the court system. Delay which is prejudicial to the opposing party will impede the efficient administration of justice because it will cause problems and engender motions which the trial court will be forced to resolve.

This Court in Morales did not directly address the consideration of prejudice to the defense when determining good cause. Rather, it approved the district court's conclusion and analysis. The district court did not reject the consideration of prejudice when determining good cause but rather noted that the federal courts, whose decisions were pertinent to its analysis because Rule 1.070(j) is patterned after the federal rule,"have [considered prejudice in deciding whether to dismiss] only after first determining that the plaintiff had been diligent in attempting service." 578 So.2d 1143,1144 (Fla. 4th DCA 1991).

Since the Defendants have alleged that only Kozel factors one, two and four are irrelevant to determining good cause for late service [Br. at 19], presumably they agree that Kozel factors three, five and six are pertinent to that determination and with good reason. Factor three requires the court to consider whether the client was personally involved in the act of disobedience. Naturally, if the client was involved in the failure to timely serve, then the concern behind the Kozel factors, i.e., not punishing the litigant for the actions of his attorney, would not be an issue.

Factor five requires the court to consider "whether the attorney offered reasonable justification for noncompliance," id.,which is the essence of a showing of good cause. Factor six requires the court to consider "whether the delay created significant problems of judicial administration," id., which is the purpose behind the rule.

Of course, if this Court should determine that one or more of the Kozel factors are not pertinent to the determination of good cause, this Court need only to instruct the trial courts to consider those factors it deems are relevant to that determination. This Court, as the ultimate arbiter of how the rules of procedure are to be interpreted, has the power to fashion any set of guidelines that will both protect the purpose of Rule 1.070(j) and insure that fairness is not sacrificed at the alter of expediency.[13]

II. SHOULD THIS COURT HOLD THAT THE APPLICATION OF THE KOZEL FACTORS TO THE DETERMINATION OF GOOD CAUSE IS NOT APPROPRIATE, IT SHOULD REMAND TO THE APPELLATE COURT FOR REVIEW OF THE TRIAL COURT'S RULING AS TO GOOD CAUSE.

If this Court holds that the Kozel factors should not be considered when good cause is determined, it should remand to the appellate court for review of the trial court's ruling as to

[13]Although the Defendants contend that "in Tampa, the issue of timely service would be limited to a consideration of the facts of the particular failure to serve the Complaint within 120 days--prior sanction history of the attorney would be irrelevant" [Br. at 24], as far as Warren knows there is no decision from the Second District Court of Appeal as to whether the Kozel factors should be applied when determining good cause. Therefore, the courts of the Second District would be free to follow either the First or the Fourth District Court of Appeal on this issue in the absence of a ruling from this Court.

good cause under the abuse of discretion standard. Defendants' request that this Court, should it disapprove and quash the decision of the district court below, affirm the trial court's order dismissing the case [Br. at 3,11,25], is improper and inconsistent with their own position that a trial court's good cause ruling should be reviewed for abuse of discretion by the appellate court. Indeed, the Defendants admit that if the trial court properly found no good cause, "then the First District Court of Appeal and this Court must affirm the trial court's judgment." [Br. at 22; emphasis added.] The district court below did not rule on whether the trial court had abused its discretion in determining that there was no good cause shown. Rather, the court reversed and remanded with instructions that the trial court apply the Kozel factors to the determination of good cause.

It is not the function of this Court in the first instance to review a good cause determination of a trial court when there has been no review of the issue by the district court. Indeed, this Court does not have jurisdiction to review findings of good cause even when there has been such review unless a conflict between district courts is at issue. See Art. V, Section 3(b), Fla. Const. The sole purpose of this Court's accepting jurisdiction in this case, should it do so, would be to resolve a conflict between two district courts of appeal as to whether the Kozel factors should be applied when good cause is determined. Thus, the Defendants' arguments to this Court concerning whether the trial court abused its discretion in finding no good cause and their attempt thereby to "poison the

well" [Brief at 15, 18, 22, 23], are improper.

However, since the Defendants have included argument concerning the propriety of the undersigned's actions and that of the trial court in finding no good cause, the undersigned feels compelled to respond to set the record straight. The Defendants' accusation that the undersigned "offers no legitimate reason for excusing [the late service], but pleads that she missed the deadline by only one day and that the rule should simply not be enforced" [Brief at 15], is both untrue and unfair. The undersigned has consistently and repeatedly explained that her secretary twice sent summonses to the clerk's office for issuance which the clerk's office refused to process [R.57,58, A.1(1)(2); A.2, A.3]. It was only when her secretary sent the summonses to the clerk's office the third time that the clerk accepted them. [R.58; A1(2); A.4].

The fact that the service was one day late is relevant because it goes to the question of diligence which is a factor in determining good cause. Warren did make a good faith effort to serve the complaint well within the 120 days but missed it by one day because of the mishaps with the clerk's office. If Warren had done nothing for 119 days and then missed it by one day the significance of the one-day late service would be different.

Warren agrees that merely because a complaint is served one day late does not <u>in itself</u> excuse late service. However, surely the degree of late service, in conjunction with the efforts, if any, made to serve the complaint before the 120 days has run, must be considered when determining whether, "...'good

faith on the part of the party seeking an enlargement and some reasonable basis for non-compliance within the time specified'..." Carlton v. Wal Mart Stores, Inc., supra, 621 So.2d at 454, quoting Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir.1985), has been shown. Whether the complaint was served one day versus one year late must factor into the determination of good faith on the part of the party attempting service.

Moreover, the Defendants unfairly criticize the undersigned's having "decided she wanted to withdraw from the case, and then delegated the responsibility of service to her secretary." [Br. at 6,15, 18, 23][14] They inaccurately allege that the undersigned has alternately acknowledged the fault in failing to timely serve as hers and blamed the late service on a "mix-up" at the clerk's office and miscommunications between her secretary and the clerk. [Br. at 7 n.3] The undersigned's explanation for the late service has been the same from the beginning of this matter. The undersigned has taken responsibility for the one-day late service only because she has the ultimate responsibility for everything that happens on a case which she is handling, including typographical and administrative errors which she herself has not personally committed. The undersigned recognizes that the buck stops here.

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[14] The decision to withdraw from the case is relevant only because the undersigned, realizing that the 120-day period was running, decided to have the Complaint served in order to preserve Warren's cause of action even though she had already decided to withdraw from the case. [T.1(6); A.8(6)]

However, as a practicing trial and appellate attorney, the undersigned has no choice but to delegate certain administrative functions to her staff, including the preparation of summonses and the filing and serving of complaints. She does not and cannot perform those functions herself and fulfill her other responsibilities. Moreover, as the Defendants know or should know, the delegation of those and other administrative functions to support staff is standard throughout the legal community. The late service occurred not because the undersigned wrongfully (as implied by the Defendants) delegated the task of service to her secretary [Br. at 6,15,18,23], but because the clerk's office twice refused to process the papers sent by her secretary.[15]

Furthermore, the Defendants' criticism (and the basis for the trial court's finding of no good cause) that the undersigned "did not even begin attempting service until almost three months had gone by" [Brief at 22; (emphasis in original)], is not a valid basis for a finding of no good cause. The trial court erred by ruling that Warren has failed to show good cause as to

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[15] The undersigned stated as follows at the hearing on April 15, 1996:

> The second mistake that I made — I said I, because mine was the ultimate responsibility — was that the complaint was served 121 days after it was filed.
>
> * * *
>
> . . .And there was a mixup at the clerk's office where a clerk kept sending papers to my secretary and they kept exchanging them back and forth.
>
> At any rate, it ended up being 121 days. I take responsibility for that. . . .

[T.3(5-7); A.11(5-7)]

why she had waited approximately 85 days in which to serve the Complaint [T.3(17); A.17], thereby imposing a new and erroneous standard on Warren in its interpretation of Rule 1.170(j).[16] In effect, the trial court has ruled that Rule 1.170(j) requires that a plaintiff seek a summons from the clerk before 85 days has elapsed or be prepared to show good cause as to why she has not done so. That is not what Rule 1.170(j) requires. It requires only that a complaint be served within 120 days of its having been filed. Warren did attempt to do that within a sufficient period of time before the 120 days had run which under normal circumstances would have allowed service within the 120 days.

The record shows that Warren sent summonses for both Defendants to the clerk for issuance on May 12, 1994, a full 35 days before the 120-day period had run. Under normal circumstances, 35 days would be ample time in which to get summonses issued and served on defendants such as Shands Teaching Hospital and Clinics, Inc., and the Florida Board of Regents, both of which are able to be served with no difficulty. The undersigned had no way of foreseeing the miscommunications between her secretary and the clerk's office whereby the former attempted to comply with the latter's requests regarding how the summonses should have been prepared. Such difficulties are extremely uncommon.

Thus, the Defendants' accusation that the undersigned "wait[ed] until there [was] barely a month left in the service

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[16]The record reflects only when the summonses were sent to the clerk for issuance and not when Ms. Sperando instructed her secretary to do so.

window, turn[ed] service of a complaint filed at the edge of the statute of limitations over to her secretary, and then expect[ed] the trial and appellate courts to abandon the rule when she misses the deadline" [Br. at 15], is ludicrous. The undersigned expects the trial and appellate courts to do only what the law requires: to determine whether good cause has been shown and to insure that cases get heard on the merits whenever possible. What she does not expect is the trial court to make new law by ruling that failure to seek a summons from the clerk within the first 85 days is not good cause as a matter of law even if a summons was sought within sufficient time to effect service barring unusual and unforeseen circumstances.

The only duty imposed by Rule 1.070(j) is that of serving a complaint within 120 days of its having been filed. This implies only a concomitant duty to initiate the process in sufficient time to get the complaint served by the end of 120 days, but certainly does not impose a requirement to start the process before 85 or any other number of days has elapsed. The question the trial court should have asked was not why Warren had waited 85 days to request the summons but rather was 35 days a sufficient period of time in which to get the complaint served. The answer to that question is yes.

The Defendants' attempt [Br. at 18] to support the trial court's finding of no good cause with the Fourth District's holding in Morales, supra, 578 So.2d at 1144, which was adopted by this Court, is without merit. The two cases are inapposite. In Morales, the plaintiff first mailed the summons forms to the clerk for issuance with only ten of the 120

days remaining. He received them three days later and then did not serve the resident agent for 11 more days, four days after the 120-day period had expired. According to the Fourth District:

> . . .the [plaintiff] blame[d] poor service in the postal system and the clerk's office due to the Christmas season as an excuse for late service. . . .
>
> * * *
>
> . . .Morales made no effort to obtain service for 110 days after filing the complaint. He gave no acceptable explanation for this delay. With only a few days remaining, and being cognizant of the mandate of the rule, counsel chose to use the mail in obtaining the executed summonses. He made no effort to serve the defendants until the 120 days had expired. . . .

Id.;(emphasis added).

In this case Warren sought the summons from the clerk's office with 35 of the 120 days remaining, more than enough time to get the Complaint served assuming the clerk's office was not going to refuse to process the request not once but twice.

That the initiation of service 85 days after the Complaint was filed does not mean that good cause is lacking is supported by Onett v. Ahola, 683 So.2d 593, 594 (Fla. 3d DCA 1996). There the plaintiff obtained an address for the defendants 15 days after the complaint was filed. Ninety-one days after the complaint was filed, a deputy sheriff attempted service at that address, but was unable to do so because he had been falsely told that the defendants did not reside at that address. The court gave no explanation as to why the plaintiff waited until the 91st day before attempting service. After unsuccessfully

attempting to determine the defendants' address through the postal service and the defendants' insurer, the plaintiffs effected service by certified mail after the 120-day period had expired. Id.

The court found that there was good cause for the late service:

> ...the deputy sheriff went to the defendants' actual address in Buffalo, New York and attempted service on the 91st day....
> [T]he plain fact is that the papers were brought to the correct address well within the 120-day time limit, and service failed only because the detective was given incorrect information.
>
> * * *
>
> ...But for the deputy being misled about the defendants' true address, service would have been accomplished on the very first attempt, which was only 91 days after the complaint was filed. Good cause was abundantly shown.

Id. at 595; (emphasis added). If 91 days by which to start to serve the complaint is "well within the 120-day time limit," supra, then 85 days to get a summons and send it to the sheriff, which normally takes only a couple of days, must be well within the time limit as well.

The combination of the initial attempt to get the Complaint served well within the 120-day period, the mishaps regarding communications between Ms. Sperando's secretary and the Clerk's office, and the fact that the Complaint was served only one day late more than establish good cause for the late service. As explained by the Fifth District in Sneed v. H.B. Construction

Co., Inc., 674 So.2d 158,160 (Fla. 5th DCA 1996),

> [rule 1.070(j)] is not intended to be a trap for the unwary, nor a rule to impose a secondary statute of limitations based on time of service. The results of such an interpretation would be harsh in a system where great emphasis is placed on deciding cases justly on the merits. We instead understand the rule to be an administrative tool to efficiently move cases through the courts....

That the original Complaint was served one day late does not affect the efficient administration of this case through the court system and dismissal for that reason would be unduly harsh.

To deprive Warren of a cause of action because her attorneys waited 85 days in which to seek summonses from the clerk which summonses were then served one day late because of miscommunications with the clerk's office would unfairly punish her and would do nothing to foster the purpose of Rule 1.070(j) which is to efficiently move cases through the courts.

CONCLUSION

For the foregoing reasons, Warren respectfully requests that this Court approve the decision of the district court in this case and disapprove Stahl v. Evans.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail this day of March, 1998 to Thomas W. Poulton, Esquire, 315 E. Robinson Street, Suite 510, Orlando, Florida 32801.

_____
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